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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 185

TAFT-INGALLS CORPORATION,

Petitioner,

v.

THE ASSOCIATED PRESS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT T. KEELER
ROBERT G. STACHLER
603 Dixie Terminal Building
Cincinnati, Ohio, 452[illegible]
Attorneys for Petitioner

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Taft-Ingalls Corporation prays that a writ of certiorari be issued to review that part of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the case of *The Associated Press* v. *Taft-Ingalls Corporation* on January 18, 1965, that affirmed the judgment of the United States District Court for the Southern District of Ohio, Western Division, dismissing Petitioner's counterclaim for damages suffered from an illegal tying arrangement imposed by Respondent The Associated Press.

OPINIONS BELOW

The memorandum opinion of the District Court has not been reported. It is printed at pages 23a-32a of the Appendix for Defendant-Appellant (Petitioner herein) filed with the Court of Appeals. The opinion of the Court of Appeals for the Sixth Circuit is reported in 340 F.2d 753 and is appended hereto at pages 1a-55a, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1965; Respondent's Petition for Rehearing en Banc was denied on February 25, 1965; Respondent's alternative Petition for Rehearing was denied on February 27, 1965. An extension of time until May 28, 1965, within which to file this Petition was granted by Mr. Justice Stewart on April 8, 1965. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

Where both an illegal tying arrangement under the Sherman Act and injury to the buyer have been established, what is the measure of proof required of the buyer to prove the extent of his injury when the seller has no separate prices and maintains no separate cost records for the tied services?

STATUTES INVOLVED

The statutes involved are the Sherman Act, section 1 as amended, 15 U.S.C. § 1; Act of July 2, 1890, chapter 647, section 1, 26 Stat. 209; Act of August 17, 1937, chapter 690, Title VIII, 50 Stat. 693; Act of July 7, 1955, chapter 281, 69 Stat. 282; and section 4 of the Clayton Act, 15 U.S.C. § 15; Act of October 15, 1914, chapter 323, section 4, 38 Stat. 731, which are set forth at p. 56a as Appendix B.

STATEMENT OF THE CASE

Petitioner was an Ohio corporation which for many years published an evening daily newspaper at Cincinnati, Ohio, called *The Cincinnati Times-Star*, until July 19, 1958, when publication was discontinued (Par. 10 of Stipulation, P. Ex. 7; R. 92a, 418a at 420a-21a; R. 94a-95a).* Respondent (hereafter sometimes referred to as the "AP") is a "mutual and cooperative" non-profit membership corporation organized under the Membership Corporation Law of New York (By-Laws, Art. I, P. Ex. 6; R. 102a, 393a at 398a-99a; Par. 1 of Stipulation, P. Ex. 7; R. 92a, 418a-19a). The costs of Respondent's operations, consisting almost entirely of overhead and general and administrative costs (R. 326a-29a), are prorated among its members under a formula of assessments said to be based on population. As a member of the AP, Petitioner paid a weekly lump sum assessment for a "package" of basic news wire services which the Court of Appeals held to be an illegal tying arrangement (Appendix A hereto, at p. 25a). This "package" of services for Petitioner consisted of the "A" wire or general news wire carrying bulletin news of top general interest, the "D" wire carrying financial and business news, the Ohio Big Cities wire carrying Ohio regional news, and the Kentucky wire carrying Kentucky regional news. (Par. 13 of Stipulation, P. Ex. 7; R. 92a, 418a at 421a-22a; R. 157a, 205a).

In 1957 Petitioner was publishing its newspaper at a loss. In an attempt to reduce its losses, on September 10, 1957, Petitioner asked Respondent to furnish it only the Ohio Big Cities news wire and to discontinue the other three news wires in Respondent's package. Respondent

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* P. Ex. is Respondent's Exhibit; D. Ex. is Petitioner's Exhibit. Exhibits are attached as part of Petitioner's Appendix (referred to as Appendix for Defendant-Appellant in the court below) filed with the Petition. All Record citations (R. ..) are to pages in Petitioner's Appendix.

refused Petitioner's request because of its long-established policy of requiring all members to receive and pay for a package of wire services (R. 109a-10a, 280a). Because the Ohio Big Cities news wire was essential to Petitioner's operations (R. 109a, 119a, 283a), it continued to pay the full weekly assessment for all of the basic news services until publication ceased on July 19, 1958, although it had a mounting deficit (par. 18(a), 20 of Stipulation; P. Ex. 7; R. 92a, 418a at 424a, 425a). The Court of Appeals found that if the request of Petitioner had been granted, it "would have effected a substantial reduction in appellant's [Petitioner's] operating costs." (Appendix A hereto, at p. 7a). The problem posed for Petitioner at the trial was to establish "how much" the reduction would have been.

Petitioner ceased publishing its newspaper on July 19, 1958, and sold some of its newspaper assets to The E. W. Scripps Co., publisher of the other Cincinnati evening newspaper. Respondent sued Petitioner in the District Court for the Southern District of Ohio for two years' wire service charges or assessments from July 26, 1958,* claiming breach of contract because of Petitioner's failure to give Respondent two years' advance notice. Respondent invoked federal diversity jurisdiction under Title 28 United States Code Sec. 1332.

Petitioner filed a counterclaim under Title 15 United States Code Sections 1 and 15, seeking to recover as damages not a loss of profits for any period, but only the extra cost of Respondent's unwanted news wire services for the period from September 10, 1957 to July 25, 1958, over and above the cost of the Ohio Big Cities news wire which Petitioner desired and which was the tying service.

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* Although publication ceased on July 19, 1958, Petitioner paid the weekly assessment through the following week ending July 26, 1958.

Except for the Kentucky wire, Respondent quoted no separate price for any of the news wires in its package (D. Ex. 35; R. 324a, 467a; D. Ex. 41; R. 289a, 497a-500a). The problem confronting Petitioner was to break down the lump sum package price among the four wires, a problem created by Respondent itself when it maintained no separate price schedule and no separate cost records. For Respondent it was all or nothing, except that the package was later offered by Respondent to Scripps without the Kentucky wire, which it then priced separately at $240.60 (D. Ex. 41; R. 289a, 497a). The problem remained to break down the lump sum price among the other three news wires in the package. Accordingly, Petitioner called upon Kirk Batzer of the accounting firm of Lybrand, Ross Bros. and Montgomery of New York, to review Respondent's costs in order to allocate Respondent's lump sum price in a reasonable way among the three remaining wires in the package. This he did in two reports (D. Ex. 54; R. 337a, 525a; D. Ex. 55; R. 337a, 541a). He also testified at length at the trial (R. 315a-44a). Respondent introduced no evidence which even questioned the breakdown of the assessment made by Petitioner's qualified expert. Moreover, Respondent offered no evidence of its own to establish a different cost or price of the various wire services.

An outline of the method used by Mr. Batzer to break down Respondent's lump sum price among the three news wires is attached at pages 58a-61a, as Appendix C. In brief, he determined what categories of Respondent's costs were properly attributable to the gathering and distribution of news provided in Respondent's basic news services. He included an appropriate share of general and administrative costs based on accepted accounting principles, and then allocated the total costs among the three wires based on a sampling of the volume of copy moving over each wire. He

concluded that a fair and reasonable breakdown of the weekly assessment paid by Petitioner was as follows: †

	SEPT. 16, 1957-DEC. 14, 1957 (*thirteen weeks*)	DEC. 16, 1957-JULY 26, 1958 (*thirty-two weeks*)
"A" wire	$ 695.63	$ 756.38
"D" wire	172.19	187.23
Ohio Big Cities wire	343.83	373.84
Total	$1,211.65*	$1,317.45**
Kentucky wire	240.60	240.60
Total Weekly Assessment	$1,452.25	$1,558.05

* Arithmetical Calculation based on D. Ex. 55
** See D. Ex. 55

This breakdown results in a calculation of Petitioner's damages, as follows:

	SEPT. 16, 1957-DEC. 14, 1957	DEC. 16, 1957-JULY 26, 1958
"A" wire	$ 695.63	$ 756.38
"D" wire	172.19	187.23
Kentucky wire	240.60	240.60
	$ 1,108.42	$ 1,184.21
	× 13	× 32
	$14,409.46	$37,894.72
		+ 14,409.46
Total Damage to Petitioner		$52,304.18

Treble damages are called for by Section 4 of the Clayton Act (15 U.S.C. Sec. 15), which amount to $156,912.54 ($52,304.18 × 3).

* Two separate periods, one from September 16, 1957 through December 14, 1957 and the other from December 16, 1957 through July 26, 1958, are involved because on December 16, 1957 the weekly assessment of Petitioner was increased by Respondent from $1,452.25 to $1,558.05.

The District Court (Judge Frank J. Battisti sitting without a jury) dismissed Petitioner's counterclaim for the reason that Petitioner had failed to show that there was "a natural division in the cost of gathering news transmitted" over the basic wire services (R. 30a). Judge Battisti held that unless "such a complete division" of costs could be shown, it would be "unnecessary and futile to explore the other elements of the alleged tying agreement" and, consequently, he never reached the issue of damages (R. 30a). The Sixth Circuit held that Respondent had engaged in an illegal tying arrangement and found that Petitioner had suffered injury. However, it dismissed Petitioner's counterclaim because "the evidence of damages is too speculative to support the counterclaim" (Appendix A, at p. 32a).

REASONS FOR GRANTING CERTIORARI

I. The Question Presented Is Of Importance In The Enforcement Of The Federal Antitrust Laws.

The characterization by the Sixth Circuit of Petitioner's evidence of damage as "too speculative" to support its counterclaim was unwarranted. The Court was not characterizing as "speculative" the evidence of the fact that Petitioner had suffered actual damage because it had found that Petitioner "would have effected a substantial reduction . . . in operating costs," if its request for only the Ohio Big Cities wire had been granted. We must necessarily conclude, therefore, that the Court was characterizing the evidence of the *extent* to which Petitioner was damaged.

Petitioner has maintained throughout this case that the calculation of the extent of its loss because of Respondent's unlawful practice was as reasonable and certain as could be made under the circumstances of this case. Respondent offered no evidence which challenged or questioned Petitioner's calculation in any way. If Petitioner's evidence of

damages is dismissed as "speculation," as was done by the Sixth Circuit, there is no apparent way for Petitioner or any other victim of Respondent's illegal tying arrangements, to prove its damages, and Respondent indeed would "profit by his wrongdoing at the expense of his victim." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, at 264 (1946).

What more could Petitioner have done in the instant case where there was no separate price for the unwanted news services and Respondent maintained no accounting records showing the separate costs of those services? In presenting its case Petitioner sought to follow guidelines established by this Court in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). In those cases the proof of the extent of damages was focused upon "loss of profits," where proof is more apt to be based upon conjecture and hypothetical comparisons than in a case of increased costs. While these guidelines may well be applicable to tie-in cases, there is no authoritative decision of this Court directly establishing how a buyer may prove the extent of his loss in such cases.

The illegal tie-in arrangement here is exemplary of many tie-in practices which by their nature preclude, or make extremely difficult, any certain determination of the amount of damages. This Court said in the *Story Parchment* case, 282 U.S. 555 (1931), at page 563:

> ". . . it would be a perversion of fundamental principles of justice to deny all relief to the injured person [Petitioner here and Buyers similarly situated in other tie-in arrangements], and thereby relieve the wrongdoer [Respondent here and Sellers similarly situated in other tie-in arrangements] from making any amend for his acts."

In the light of this statement a ruling by this Court on the proper standards to be applied in measuring the extent of damages in tie-in cases is critically needed.

II. The Sixth Circuit's Decision On Petitioner's Damages Was Erroneous Because Fundamental Principles Announced By This Court Were Not Followed.

This Court has held that a legitimate measure of damages in an antitrust case is the amount of the illegal exaction imposed by the offending party. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906); *Thomsen* v. *Cayser*, 243 U.S. 66 (1917). As to the quantum of proof required to establish the "illegal exaction" or damages in an antitrust case, the well recognized rule is stated in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), at 563:

> "... it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Accord: Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

Once Petitioner established that it was a victim of an illegal tying arrangement and, in fact, was damaged, the last step was to prove the "extent of the damages" it incurred. Following the teaching of this Court, Petitioner showed that the illegal exaction was the amount which it was forced to pay for the unwanted wire services in order to obtain the Ohio Big Cities wire service which was indispensable to its business. Through its qualified expert, who obtained his information from relevant data in Respondent's possession, Petitioner showed that part of its

assessment which it was required to pay for three unwanted news wires in order to receive the Ohio Big Cities wire. If Petitioner's evidence did not satisfy the minimum requirement of showing "the extent of the damages as a matter of just and reasonable inference," it is difficult to conceive of any case involving the illegal tying of products not separately priced where an injured buyer could ever be fully redressed. More important, the instant decision on damages, which sets an unfortunate precedent, impedes the carrying out of Congress' intent in authorizing antitrust suits by private persons as expressed by this Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), at 751-52:

> ". . . Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."

III. The Decision Below on Petitioner's Damages Was Inconsistent With Fundamental Principles Applied by the Sixth Circuit Itself and the Other Circuits.

In *Darden* v. *Besser*, 257 F.2d 285 (6th Cir. 1958), the Sixth Circuit affirmed an award of damages of $15,000 in a Sherman Act case, apparently for lost profits, where the trial court had rejected as evidence an estimate of future profits, but had accepted evidence of going concern value, goodwill, and the existence of a qualified staff and satisfactory credit arrangements with a supplier (147 F. Supp. 376, at 382). The Court cited no authority, remarking that "the compensation allowed seems quite low in the circumstances" (257 F.2d at 286). Such a holding is inconsistent with its holding in the instant case, where after finding that an illegal tying arrangement existed and that Petitioner had in fact been damaged, the Court

refused to accept the *only* available evidence of damages, characterizing it as "too speculative" (Appendix A, at p. 32a).

The Sixth Circuit's decision on damages in the case at bar is also inconsistent with the principles of measuring damages in the following recent cases: *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. den.*, 377 U.S. 993 (1964), in which the Ninth Circuit recognized that the excess cost of tied products to the coerced buyer was a legitimate element of the buyer's damages; *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963), a case based on an alleged tie-in of Goodyear TBA to a service station lease, in which the Fourth Circuit affirmed an award of actual damages "due to the slightly higher cost of the Goodyear TBA which Osborn purchased, over those brands he would have preferred" (324 F.2d at 570); and in *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F.2d 331 (2d Cir. 1953), *cert. den.*, 345 U.S. 994 (1953), in which the Second Circuit noted at page 334 that if the Sherman Act had been violated, "the actual damages flowing from that violation may well have included the additional amount which the plaintiffs had to pay because of the tie-in purchases they were compelled to make."

The decision of the Sixth Circuit in the instant case is also inconsistent with the principles governing the quantum of proof of damages required in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. dism'd.*, 371 U.S. 801 (1962). At page 578 the Tenth Circuit there affirmed the jury's action in setting a price which should have been paid to the miners for their ore at 2¢ per pound above the highest negotiated price in evidence, although the negotiated price did not yield a profit to the mills, which had actually lost money in operation. At page 580 the Court affirmed a jury finding of a free market price of 40¢ per pound rather than the 31¢ actually paid by the monopolists, on the basis of the

profit spread between the cost of vanadium ore and the price of oxide and ferrovanadium. The decision here is inconsistent with *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. den.*, 342 U.S. 909 (1952), in which the Seventh Circuit at page 566 upheld a verdict and judgment based on an accountant's comparison of the receipts of plaintiff's and defendants' theaters, specifically holding that once there had been proof of the fact of damage, defendants' attempts to show fallacies and inaccuracies in the exhibit prepared by the accountant were no reason to set aside the verdict; *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 69 F. Supp. 103 (E.D. Penna. 1946), *aff'd.*, 164 F.2d 1021 (3rd Cir. 1948), *cert. den.*, 334 U.S. 811 (1948), in which the Third Circuit affirmed the judgment below even though the trial court stated that there was an element of speculation or guesswork in its assessment of probable profits to be awarded as damages, since only approximate accuracy was required; and *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F.2d 152 (2d Cir. 1930), *cert. den.*, 282 U.S. 864 (1930), in which the Second Circuit affirmed judgments for damages based in one case on an expert's projection of increasing profits, and in another on the jury's estimate of lost profits based on the company's financial history. The Court found that the fact of damage was certain and that the estimate of lost profit, introduced as such, was as good proof as the nature of the case allowed, pointing out that "the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony." 42 F.2d at page 155.

CONCLUSION

Petitioner submits that the decision of the Sixth Circuit in the instant case on the question of damages to Petitioner

from the Respondent's antitrust violation is inconsistent with settled principles which should be used in tie-in cases to govern both the measure of damages and the proof necessary to establish them. Unless reversed by this Court, such a decision will serve only to work mischief far beyond its immediate effect on Petitioner. That immediate effect is, of course, to deprive Petitioner of any chance to recover any part of its loss. Under the principles of damages applied by other Courts of Appeals and even by the Sixth Circuit (prior to the instant decision), Petitioner clearly was entitled to recover that loss.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT T. KEELER
ROBERT G. STACHLER
Attorneys for Petitioner.